

16TH Annual Indian Law Conference

Current Taxation Issues in Indian Country - Federal Update

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OVERVIEW

- TAX EXEMPTION PLANNING
 - GENERAL WELFARE EXCLUSION
 - TRUST PER CAPITA DISTRIBUTIONS
- IRS 2017 WORK PLAN
 - AREAS OF ENFORCEMENT
- TAX REFORM
 - LEGISLATIVE
 - REGULATORY

TRIBAL GENERAL WELFARE EXCLUSION ACT ("GWE")

- IRC § 139E
 - Legislatively provided program for the promotion of general welfare.
 - Very broad authority. Deference to tribe.
 - Requirements:
 - Not compensation
 - Not discriminate in favor of governing body
 - Equal access if meet guidelines
 - Not lavish and extravagant

TRIBAL GENERAL WELFARE EXCLUSION ACT ("GWE")

- REV. PROC. 2014-35 - IRS administrative rule still in effect
 - Nonexclusive list of qualifying programs for safe harbor tax exemption (housing, education, transportation involving essential services, elder care, cultural, religious)
 - No audits until TTAC completes initial tasks

GWE

TREASURY TRIBAL ADVISORY COMMITTEE

- TTAC role: “advise the Secretary on matters relating to taxation of Indians.” Pub. L. 113–168, § 3(b)(1)
 - training of IRS personnel on Federal Indian law and the unique treaty and trust relationship
 - define what constitutes “lavish and extravagant” benefits under an Indian tribal government program.
 - TTAC also sees its role as addressing issues that are brought to it by tribes regarding GWE
 - info@ttacresources.org.

GWE

TREASURY TRIBAL ADVISORY COMMITTEE

- New Treasury Point of Contact Tribal Consultation (June 2016) – Beverly Babers
- Seven member committee:

Treasury appointees:

1. Chairman W. Ron Allen of Jamestown S’Klallam tribe,
2. Treasurer Lacey Horn of the Cherokee tribe, and
3. Chief Lynn Malerba of the Mohegan tribe.

GWE

TREASURY TRIBAL ADVISORY COMMITTEE

Congressional appointees:

1. Sharon Edenfield, Tribal Council Member for the Confederated Tribes of the Siletz Indians. Sen. Ron Wyden (D-OR)
 2. Eugene Magnuson, Treasurer of the Pokagon Band of Potawatomi. Rep. Sander Levin (D-MI)
- Two yet to be appointed by Rep. Kevin Brady (R-TX), Sen. Orrin Hatch (R-UT)

GWE

TREASURY TRIBAL ADVISORY COMMITTEE

- Per recent Treasury advice:

TTAC cannot conduct its first meeting until all seven of the members are appointed.

- Current members pushed for quorum rules to start work.
- Terms not considered to start until 1st meeting
- Treasury representative is not disclosed, but identified

GWE

NAVIGATING UNCERTAINTY

- “LAVISH AND EXTRAVAGANT”
 - No prior rulings
 - No bright line – common sense measures
 - Substantiate level of benefit
- EXEMPT RESOURCE – SSA
 - GWE not based on financial need; SSA is based on financial need
 - Uneven application of GWE thus far
 - New Mexico ruling – GWE elder benefits exempt
 - Washington – GWE elder benefits non-exempt
- Issue raised with Treasury, IRS and Congress

GWE

NAVIGATING UNCERTAINTY

- Flexible spending model
 - "All members of X tribe have needs. X's general welfare program provides cash benefits to all members to spend as each member sees fit." IRS believes that a policy this broad sounds like a per capita payment.
 - *U.S. vs. JIM (Miccosukee)*. Ruled taxable per capita.
 - Tens of thousands per month
 - No substantiation (written guidelines, proof of expense, etc.)
 - Admittedly to evade tax
 - IRS: "no comment"

GWE

NAVIGATING UNCERTAINTY

- **BEST PRACTICES**
 - Ordinance and/or written program guidelines
 - Clarify and document the particular need
 - Direct pay, reimbursement, something else?
 - Sufficient safeguards to ensure program is addressing the need and meeting program requirements.
 - Regular testing for program compliance and reasonable level of benefits

TRUST PER CAPITA

- Notice 2015-67 per capita distributions made by tribes from funds held by the Secretary of the Interior as part of a tribal trust account are excluded from the gross income of tribal members.
- The funds in the trust account must be from sources which qualify to be deposited into trust per 25 C.F.R. §§ 115.702.

TRUST PER CAPITA

- EXCEPTIONS TO TAX EXEMPTION –
ABUSE AND EVASION EFFORTS:
 1. MISCHARACTERIZED LEASE REVENUE
 2. COMPENSATION
 3. NET BUSINESS PROFIT

TRUST PER CAPITA

- DIRECT PAY – INTERIM GUIDANCE
 - BIA may approve direct payment to a tribe from the leases and contract operators
 - May 26, 2016 IRS issued “Interim Guidance on the Direct Pay of Tribal Lease Funds”
 - These lease revenues also qualify for exemption
- HEARTH LEASES UNRESOLVED
 - IRS expects to clarify
 - Interim measures: ensure funds are traced to trust resource

IRS ENFORCEMENT IN 2017

- IRS WORK PLAN
 - Examination focus reduced
 - Compliance checks- employment tax, information reporting and TRDA reviews
 - Education of agents
 - Outreach to tribal clients and POCTC consultation support
- REPORT FROM ITG DIRECTOR-Christie Jacobs
 - Tribal Council Social Security - Need legislative fix
 - SSA application of GWE - Need legislative fix
 - Leadership transition; fewer resources

LEGISLATION UPDATE

- Tribal Tax and Investment Reform Act of 2016 (H.R. 4943) - Addressing tax parity
 - Tax Exempt Financing - Remove “essential governmental function” test- IRC §7871
 - Pensions – “governmental plans” include tribal government plans – IRC §457
 - Tribes may receive charitable contributions – IRC §170
 - Adoption tax credit available for children determined by tribe to have special needs
 - Needs co-sponsors and Senate companion bill.
Supported by Treasury.

LEGISLATION UPDATE

- Indian Community Economic Enhancement Act (“ICE”)-S. 3234. Approved by SIA committee.

Addressing barriers to economic growth through improvements to the following laws:

- The Native American Business Development, Trade Promotion, and Tourism Act of 2000 – Indian Economic Development Feasibility Study by GAO re: bond/guaranty funds and credit utilization
- The Buy Indian Act – counts 8(a)
- The Indian Trader Act – update and address dual tax - not in final version

REGULATORY REFORM

- Leasing – 25 CFR 162.
 - Expression of strong federal interest and tribal interest to pre-empt state taxation of activities, permanent improvements, possessory interest on leased trusted lands.
- Rights of Way – 25 CFR 169. Corollary to leasing regs
- Indian Trader – 25 CFR 140. Effort suspended.
 - Confirm tribal licensing authority
 - Consent to jurisdiction
 - address pre-emption similar to ROW and leasing regs.

THANK YOU!

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